FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6067

BILLY DUREN,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR PETITIONER

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I.

IN JACKSON COUNTY, MISSOURI, THE WOMAN WHO DOES NOT SEEK JURY SERVICE IS ROUTINELY LEFT OUT IN THE SELECTION PROCESS; NO AFFIRMATIVE STEP IS REQUIRED ON HER PART, SHE IS AUTOMATICALLY DEEMED UNAVAILABLE.

In a vain attempt to diminish Taylor v. Louisiana, 419 U.S. 522 (1975),

respondent presses a distinction between Louisiana's former opt-in system for women jurors, and Missouri's opt-out variant. In Missouri, respondent asserts, women "are excused from jury service only when they take affirmative steps to notify the court that they do not wish to serve." R.Br. 8. Incredibly, in light of undisputed fact, the point is pushed with specific reference to the county involved here: "In Jackson County . . . [e]ach year [a woman] must take affirmative steps to avoid jury duty." R.Br. 4. But whatever efforts may be made in other parts of the state to encourage women to serve,[1] it is crystal

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[1] E.g., in St. Louis, where the case described in R.Br. 12 n.5 (opinion set out R.Br. App. B) was tried. Absent from respondent's reference to recent St. Louis experience is any acknowledgement of large differences in post-Taylor practices of jury commissioners there and in Jackson County, where petitioner Duren was tried. First, the questionnaire set out in Mo. Rev. Stat. § 497.130 (Supp. 1975), eliciting the sex of the addressee and three times flagging the expendability of females as jurors, is mandated for Jackson County only. Second, respondent has not considered it appropriate to inform this Court whether, outside Jackson County, jury commissioners follow the convenient practice, adhered to in Jackson County, of excluding from service any woman who fails to appear in response to the summons. See A. 17-18, 20, 34.

Asked to amplify R.Br. 12 n.5, respondent would no doubt confirm that 1) the Jackson County questionnaire is not used in St. Louis, and 2) women in St. Louis are not assumed by their silence when summoned to have opted out. Cf. Report of St. Louis County Director of Court Administration Robert G. Ruhland, (footnote continued)

clear that Jackson County requires no step of any kind on the part of a woman who does not seek service.

On the contrary, the Jackson County woman who, like her pre-1975 counterpart in Louisiana, does nothing at all, never appears on a jury venire. If she returns no questionnaire, and does not respond to a jury service summons, then by respondent's own admission, she is deemed to have "exercised her right not to serve." R.Br. 5; A. 17, 20. In short, far from requiring females to step forward and affirmatively claim exemption, the Jackson County system leaves women out, unless they take affirmative steps to be included. A man who ignores a jury summons is subject to punishment for contempt;[2] a woman who does the same thing is chivalrously deemed unavailable. A. 17, 20. But see Porter v. Freeman, 577 F.2d 329, 332 n.7 (5th Cir. 1978) ("Indeed, any presumption against women's availability for jury service would run afoul of Taylor v. Louisiana . . . ."). Beyond question, a system so rooted in "a traditional way of thinking about females"[3] deliberately limits the kind of juror likely to hear a case.

(footnote continued)
Computer Expected to Speed Up Trial System, June 12, 1978, at 1, 16-18 (in St. Louis County, both questionnaire and summons use sex-neutral terms; neither indicates any woman's exemption).

[2] See Mo. Rev. Stat § 494.080.

[3] Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J. concurring opinion).

II.

THE CONSTITUTION'S FAIR CROSS-SECTION REQUIREMENT IS VIOLATED WHEN (1) A SIGNIFICANT DISPARITY EXISTS BETWEEN THE DEMOGRAPHIC PATTERNS IN A COUNTY AND THE RELATIVE PERCENTAGES OF EACH COGNIZABLE DEMOGRAPHIC GROUP ON THE JURY LISTS, (2) A NON-NEUTRAL SELECTION CRITERION IS EMPLOYED, AND (3) THE STATE ESTABLISHES NO JUSTIFICATION FOR THE DISPARITY OR THE CRITERION.

It bears emphasis that the Jackson County figures introduced in this case were undisputed: less than 30% of the persons on the 1976 master wheel, and only some 15% of those appearing for jury duty, were women. This, according to respondent, is a "fair cross section." R.Br. 5-6. It should suffice to point out that a proportion double that of Jackson County has been authoritatively held a substantial underrepresentation establishing a prima facie case under this Court's precedent. Porter v. Freeman, 577 F.2d 329, 332 (5th Cir. 1978)(female population 53.8%, female representation on jury roll 33.4%).

In an argument of extraordinary fancy, respondent asserts the absence of an established causal link between the low "percentage of women who actually appeared in court" and the multiple, sex-specific drop-out invitations extended to Jackson County females. R.Br. 15. Carrying the caprice further, respondent suggests that

this Court indulge an inference "from the evidence" that women "excused after receiving the summons had reasons other than their sex-related exemption." R.Br. 17. But precisely the opposite inference is made in Jackson County: a woman who does not appear in response to the summons is assumed to have exercised her sex-related exemption. A. 17-18, 20, 34. Indeed, the assumption in which respondent now seeks refuge, i.e., that generally women who disregard the summons may be deemed to qualify for a sex-neutral (occupational or age) exemption (R.Br. 15), is patently insupportable. A stipulation between Prosecuting Attorney and Public Defender in a contemporaneous Jackson County case raising the same sixth/fourteenth amendment issue, Combs v. Missouri, No. 77-7012 (cert. filed June 30, 1978), is revealing in this regard. The stipulation, which is appended to the petition for certiorari in Combs, shows that of 30,165 women who returned questionnaires used to compile the 1976 Jackson County master jury wheel, only 3,342 affirmatively indicated a willingness to serve, smaller numbers indicated any basis for occupational, age or infirmity exemptions, but 21,884 (approximately 72.5%) indicated they "declined to serve for no other apparent reason than the female exemption."[4]

Moreover, as the Memorandum for the

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[4]The relevant portion of the stipulation in Combs is set out in an Appendix to this Reply Brief. For a similar reference to a stipulation in a related case, see this Court's opinion in Taylor v. Louisiana, 419 U.S. 522, 524 & n.3 (1975).

United States as Amicus Curiae 22 n.28 graphically demonstrates, most of the occupations for which Missouri accords exemption are predominantly male. Further, there is no significant difference between the voter registration rate of Missouri women and men. P.Br. 4 n.2. And most significantly, experience in other states and in the federal courts makes it apparent that, despite a range of occupational exemptions as well as age, physical infirmity and child-care excuses, women serve in dramatically high numbers so long as no sex-specific, nonfunctional exemption is used to beckon them to avoid service. See Memorandum for the United States, supra, 29 n.35; P.Br. 24 n.23; 556 S.W.2d at 24 (dissenting opinion); Porter v. Freeman, supra.

Given the gross underrepresentation of the largest cognizable group in the community, and the concededly non-neutral selection system Jackson County employs, the burden was cast on respondent to rebut petitioner's clear showing of a violation of the fair cross-section rule. See Castaneda v. Partida, 430 U.S. 482, 495-99 (1977); Berry v. Cooper, 477 F.2d 322, 327 (5th Cir. 1978). It is hardly surprising that respondent attempted no such rebuttal. Nor is it any wonder that even before this Court, respondent offers no justification whatever for the multiple invitations not to serve extended to every jury-eligible woman in Jackson County. The only genuine explanation for the gross underrepresentation of females is Jackson County's fully automatic exemption for "any woman." And surely the Constitution's requirement of a fair cross section is not so toothless as to permit under the guise of "privilege"

automatic exemption for any large cognizable class, whether women, men, blacks, whites, Mexican-Americans.

In sum, the statistics before the Court lead inexorably to this conclusion: week after week in Jackson County criminal defendants are subjected to jury panels on which women are grossly underrepresented because they are 1) told they need not serve, 2) invited by questionnaire and summons to mail in their election not to serve, and 3) ultimately assumed, when they are silent, to decline to serve on the basis of their sex. Petitioner Billy Duren was tried for a serious crime. The Constitution guarantees him a jury drawn from a fair cross section of the community. Women constitute 54% of Billy Duren's community; they accounted for 9.4% (5 out of 53) of the panel from which his all-male jury was selected. The notion that the fair cross-section requirement was met in Billy Duren's case defies reason.

III.

SELECTION OF A PETIT JURY FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY IS PART OF THE DEFINITION OF THE CONSTITUTIONALLY-MANDATED JURY TRIAL RIGHT; "HARMLESS ERROR" ARGUMENT IS THEREFORE AS INAPPOSITE HERE AS IT WAS IN PETERS v. KIFF, 407 U.S. 493 (1972), AND TAYLOR v. LOUISIANA, 419 U.S. 522 (1975).

Taylor v. Louisiana leaves no corridor for respondent's argument that "violation of the cross-sectional standard" must go unchecked absent proof Duren was harmed thereby (R.Br. 6, 17-19). In Taylor, the Louisiana Supreme Court emphasized that defendant, a man charged with an aggravated kidnapping involving two women and a child, had "shown no prejudice" chargeable to Louisiana's exemption of women from jury service. 282 So.2d 491 (1973). Before this Court, the Louisiana Attorney General argued repeatedly that absent a showing of harm, Taylor's conviction should not be set aside "on the basis that there were not enough women on the jury roles [sic]." Brief of Louisiana, Appellee, Taylor v. Louisiana, at 18. The point was made with unmistakable clarity:

> [Taylor] makes no allegation that, had women been included, his trial would have been any more fair or impartial, nor that their absence caused him any harm. Id. at 17-18.
>
> [W]here we are dealing not with a prohibition against a class, but with an exemption, and not with racial discrimination, the State of Louisiana contends that appellant, who is not a member of the alleged absent class, must show some possibility of harm or prejudice to himself in order to have his conviction reversed. Id. at 21.

See also id. at 22-23 for further argument by Louisiana of the same style, content and quality.

Mr. Justice Rehnquist, sole dissenter in Taylor, observed (419 U.S. at 538-39):

> The Court's opinion reverses a conviction without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected . . . .

Later, in his concise dissenting opinion, he reiterated: "[T]he criminal defendant involved makes no claims of prejudice or bias." 419 U.S. at 542. And, in conclusion. he stated: "Absent any suggestion that appellant's trial was unfairly conducted, or that its result was unreliable, I would not require Louisiana to retry him . . . ." 419 U.S. at 543. But eight members of this Court firmly rejected that position. Citing Peters v. Kiff, 407 U.S. 493 (1972), the majority held Taylor was entitled to tender and have adjudicated the claim that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community. 419 U.S. at 526. The Court emphasized that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial" (made applicable to the states via the fourteenth amendment). 419 U.S. at 528.[5] Absence of this essential

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[5]Respondent (Br. 10-12) appears to tender the argument, extraordinary after Duncan v. Louisiana, 391 U.S. 145 (1968), Williams v. Florida, 399 U.S. (footnote continued)

component, regardless of the quality of the criminal proceeding in other respects, necessitates reversal of the judgment below.

In sum, as Peters and Taylor exemplify, this Court has never suggested that a ruling on the constitutionality of a jury selection system turns on any showing of prejudice to the defendant. For a state's failure to adhere to the fair cross-section requirement in a particular case is inherently indeterminable in prejudicial impact.[6]

(footnote continued)
78 (1970), and, most particularly, Taylor v. Louisiana, 419 U.S. 522, 530 (1975), that only the concept of "ordered liberty," not sixth amendment strictures, should be the focus of decision. The court below entertained no such misapprehension. It recognized, as this Court's precedent requires it to, that the issue is the fourteenth amendment due process principle "as that principle embodies fulfillment of the Sixth Amendment [jury trial guarantee]." 556 S.W.2d at 11 (emphasis supplied). It is far too late in the day to invite the Court to restore in this area the amorphous, ad hoc approach of determining, based on the peculiar circumstances surrounding each individual case, whether "ordered liberty" has been undermined.

[6]It is hardly surprising that respondent, as prosecutor, views the evidence as "overwhelming," sufficient to establish guilt beyond a reasonable doubt "regardless of the composition of the jury." R.Br. 18-19. But it is not the prosecutor's function to make that judgment. Nor is it the function of a judge. Petitioner denied his guilt, asserted a defense, and called witnesses who testified to his
(footnote continued)

Judicial speculation on the result had defendant been accorded his constitutional right in regard to jury selection not only would impose on appellate courts a function inappropriate for them,[7] it would be tantamount to a directed verdict of "guilty." See Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 541-42 (1969). In accordance with this Court's long and

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(footnote continued)
absence from the scene of the crime. The sixth amendment safeguards his right to have a jury, drawn from a fair cross section of the community, not the prosecutor or the judge, determine witness credibility and the weight each item of evidence merits.

Following the trail respondent takes, a jury selection system, however discriminatory, would be invulnerable, indeed, the jury could be dispensed with entirely, so long as the prosecution persuaded the judge evidence of guilt overwhelmed. But regardless of the strength of the prosecutor's case, a criminal defendant in our system is entitled under the Constitution to a jury trial; by definition, that means a jury drawn from a fair cross section of the community.

[7]I.e., the formidable task of divining in every appeal involving a challenge to the composition of a jury, how a different jury--one selected in a manner consistent with the Constitution, potentially including persons from a group or groups left out at trial--might conceivably respond. A seer might find herself equal to the task; a judge who cannot see through the eyes of another, particularly one of dissimilar sex, race, background and experience, should find the assignment impossible.

consistent treatment of the question, therefore, a harmless error rule may not be applied in this case.

CONCLUSION

For the reasons presented by petitioner, the decision below should be reversed, and the jury service exemption for "any woman" mandated by Mo. Const. Art. I, § 22(b), and Mo. Rev. Stat. § 494.031(2) should be declared unconstitutional.

Respectfully submitted.

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APPENDIX

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Extract from Stipulation appended to the petition for certiorari in Combs v. Missouri, No. 77-7021 (cert. filed June 30, 1978)

[The Stipulation, dated December 14, 1976, and filed in the Circuit Court of Missouri, Sixteenth Judicial Circuit, is signed by Assistant Prosecuting Attorney George Ely, Jackson County Courthouse, Kansas City, Missouri, and Assistant Public Defender William Lopez, Kansas City, Missouri.]

. . .

3. On February 4, 1976, the Office of the Public Defender for the Sixteenth Judicial Circuit was authorized to obtain from the Jackson County Circuit Court Administrator all "Official Notice and Questionnaire" forms which were received, processed and used to compile the 1976 Jury Wheel for Jackson County. On February 11, 1976, the Office of the Public Defender received all such questionnaires from the Office of the Circuit Court Administrator.

The questionnaires were so sorted to separate those sent to males from those sent to females. Questionnaires sent to females were sorted to determine the following information and counted in each category thereby obtaining the following totals:

Category	Total Number of Questionnaires
Information on the face of the questionnaire showing that the woman was no longer a resident of Jackson County, Missouri	817

[Category]	[Total Number of Questionnaires]
Female government employees who indicated they would not serve	21
Female professionals, including clergy, who indicated they would not serve	93
Females who indicated prior jury service on the questionnaire (Line 12) but indicated they were willing to serve	132
Females who indicated prior jury service but were not willing to serve	20
Female teachers who indicated they would not serve	437
Questionnaires indicating that the addressee was in a nursing home	50
Questionnaires indicating in Line 11 that the woman was physically unable to serve or some other written indication of physical infirmity such as loss of hearing, or who indicated they were ineligible under the statutes	1,106
Questionnaires showing that the woman was over 65 years of age and with no affirmative indication of willingness to serve	2,059

[Category]	[Total Number of Questionnaires]
Questionnaires showing that the woman was under 21 years of age	151
Questionnaires returned with the notation that the addressee was deceased	53
Questionnaires indicating that the woman declined to serve for no other apparent reason than the female exemption	21,884
Questionnaires with affirmative indications that the woman would serve, or without any indication of refusal	3,342

4. The Court may take judicial notice of the Department of Commerce, Bureau of Census, statistics contained in attached Exhibit "E," which is hereby incorporated by reference, entitled "General Population Characteristics."